173 (2)

No. 10-408

In the Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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October 22, 2010

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COUNTER-STATEMENT OF QUESTION PRESENTED

The only question that may be properly presented to this Court is the issue framed in Petitioner's Complaint and argued before the District Court: Whether Petitioner Glacier Electric Cooperative is prohibited from challenging tribal court subject matter jurisdiction a second time after expressly abandoning the issue during its first appeal to the U.S. Court of Appeals for the Ninth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Glacier Construction, Inc., a Montana company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of Glacier Construction, Inc.

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STATEMENT OF THE CASE

Respondents (the Estate of Scott Sherburne, Ron Bird and Herb Gilham, Individually and on behalf of Glacier Construction, Inc.) brought suit in Blackfeet Tribal Court in 1992 for claims which arose out of contractual dealings between petitioner and respondents for construction on the Blackfeet Reservation of electrical power transmission facilities. Petitioner, Glacier Electric Cooperative, is an electric cooperative located in Cut Bank, Montana. Approximately eighty percent (80%) of its members are individuals and businesses that reside on the Blackfeet Reservation. A majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and reside within the exterior boundaries of the Blackfeet Reservation.

At the conclusion of the trial between the parties, judgment was entered against petitioner on May 19, 1993. An Appeal was filed by Petitioner in the Blackfeet Tribal Appellate Court. The petitioner did not make any objections during closing argument, nor did it raise any due process or other error with respect to the closing argument in its appeal to the Blackfeet Tribal Court of Appeals.

After the Blackfeet Tribal Appellate Court affirmed the Judgment, the petitioner opposed granting the Tribal Court judgment comity and challenged subject matter jurisdiction before the United States District Court. Judge Paul G. Hatfield, in a Memorandum and Order dated January 20, 1998, Pet.App. 81a, held that the Blackfeet Tribal Court had subject matter jurisdiction under the analysis approved by the United States Supreme Court in ***Montana v. United States***,

450 U.S. 544 (1981). Judge Hatfield's Memorandum and Order also addressed the subsequent decision of the United States Supreme Court in ***Strate v. A-1 Contractors***, 520 U.S. 438 (1997). Pet.App. 84a-97a.

Petitioner appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit, but expressly abandoned the issue of subject matter jurisdiction and only challenged Judge Hatfield's ruling on comity. *See* Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 ("the Co-op abandons its position" regarding tribal court jurisdiction); *see also* Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b ("our appeal in Bird does not involve any issues of tribal jurisdiction").

The decision by the Ninth Circuit Court of Appeals in ***Bird v. Glacier Electric Coop. Inc.***, 255 F.3d 1136 (9th Cir. 2001) did not declare the judgment entered by the Blackfeet Tribal Court to be invalid. The Ninth Circuit carefully and consciously limited its holding to the due process requirement of extending comity to a tribal court judgment and ruled that that the Blackfeet Tribal Judgment was not entitled to comity for enforcement outside the boundaries of the reservation. The Ninth Circuit expressly stated that it declined to ". . . address whether there may be further proceedings in the tribal court." ***Bird***, 255 F.3 at 1139, N.2.

In 2008, during continuing efforts by respondents to obtain a Debtor's examination in Tribal Court, the petitioner filed this action in the United States District Court to once again challenge subject matter jurisdiction. The complaint filed by petitioner in the United States District Court did not raise any "special

circumstances" nor "due process" grounds. Its sole argument was that the tribal court lacked subject matter jurisdiction. Pet.App. 138a. The Complaint filed by Petitioner in 2008 makes clear that it was again challenging subject matter jurisdiction and it is devoid of any argument of due process or special circumstances that would warrant a reconsideration of subject matter jurisdiction. As stated in its Complaint:

> 28. The Defendants' Tribal Court Judgment is void because the Tribal Court did not have subject matter jurisdiction over the Glacier Construction business dispute.

App. 138a.

During oral argument, counsel on behalf of respondent confirmed to the United States District Court that respondents were not and would not seek to enforce the judgment from assets outside the Blackfeet Reservation. Pet.App. 27a and 39a. The district court held that the issue of tribal subject matter jurisdiction was "res judicata" based on petitioner's abandonment of the issue in its first appeal. Pet.App. 34a-38a. In an unpublished memorandum decision, the Ninth Circuit affirmed, holding that "issue preclusion attached to the district court's 1998 decision. . . . the determination of subject madder jurisdiction made by the district court was never disturbed." Pet.App. 2a-3a.

REASONS FOR DENYING PETITION

1. The petition presents no issue worthy of this Court's attention. The issue decided by the lower courts is one of ordinary civil procedure – the inability of a party to re-litigate an issue expressly abandoned

on appeal 10 years earlier in a proceeding between the same parties. The decisions by the lower courts were based upon basic fundamental concepts of civil procedure: law of the case, *res judicata* and issue preclusion. The petitioner is simply asking this Court to correct a perceived error by the lower courts which would entitle the petitioner to re-litigate tribal court subject matter jurisdiction many years after expressly abandoning the issue below. Res.App. 1b and 5b. The recent decision by the district court which granted respondents' Motion for Summary Judgment and was affirmed by the Ninth Circuit was grounded on well-established precedent of this Court and of the Ninth Circuit. ***Cocke v. Halsey***, 41 U.S. 71 (1842); ***Sherrer v. Sherrer***, 344 U.S. 343, 68 S.Ct. 108 (1948) and ***Donnovan v. Mazzola***, 761 F.2d 141 (9th Cir. 1985) *citing*, ***Sherrer v. Sherrer***, *supra*. Pet.App. 81a-98a.

The petitioner concedes that there is no conflict among the circuits that requires this Court's intervention. Petitioner only argues that the Ninth Circuit decision on issue preclusion contradicts decisions of this Court and Ninth Circuit precedent. *See* Petition at 13-15. The petitioner attempts to manufacture a change of facts that governed the decision on subject matter jurisdiction by United States District Judge Paul G. Hatfield in his Memorandum and Order of January 20, 1998. The underlying facts did not and could not change with respect to the determination that the tribal court had subject matter jurisdiction. Petitioner's large and pervasive presence on the Reservation and its contractual dealings with respondents and other members of the Tribe have not changed between the time of the initiation of the underlying action in tribal court in 1992 and today. The only pertinent fact which

petitioner seeks to avoid is that it had the opportunity to challenge subject matter jurisdiction, it did so at the District Court level in 1998 and then expressly abandoned the issue on its first appeal to the Ninth Circuit. *See* Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 ("the Co-op abandons its position" regarding tribal court jurisdiction); *see also* Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b ("our appeal in Bird does not involve any issues of tribal jurisdiction").

2. Contrary to petitioner's assertions, there has been no change in the law governing tribal court subject matter jurisdiction. The subject matter jurisdiction analysis undertaken by Judge Hatfield was based upon the decisions that are still controlling today: ***Montana v. United States***, ***supra*** and ***Strate v. A-1 Contractors, supra***. While petitioner argues that the decision in ***Plains Commerce Bank v. Long Family Land and Cattle Company***, 128 S.Ct. 2709 (2008) represented a change in the law, its reliance upon the decision is misplaced. Nothing in *Plains Commerce Bank* supports the proposition offered by the petitioner – that federal courts should ignore the doctines of *res judicata* and issue preclusion to allow a non-Indian party an opportunity to re-litigate subject matter jurisdiction in their effort to prevent the enforcement of a tribal court judgment within the tribe's reservation. Cleary, the petitioner is asking this Court to bend and twist its precedent in order to undo petitioner's abandonment of its challenge to tribal court subject matter jurisdiction 10 years ago.

As the Ninth Circuit noted in its decision, Pet.App. 1a, subject matter jurisdiction is a threshold inquiry.

Whether labeled "*res judicata*" or "issue preclusion", the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision by Judge Hatfield on subject matter jurisdiction. Subject matter jurisdiction was litigated by the same parties under the same facts in 1998. The petitioner attempts to now change the issue from subject matter jurisdiction as argued below, to due process in its petition to this Court. However, due process issues challenged in a foreign court with respect to enforcement of a foreign judgment on foreign ground are not a valid basis of collateral attack in the federal courts. A court in a sovereign state cannot interfere with the proceedings in a court of another sovereign state. ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964). The lower courts expressly followed the decision in ***Banco Nactional DeCuba***, *supra,* holding that an action by a foreign court may not be examined by a federal court even if the foreign action is in conflict "with our notions of justice – if those acts are executed within the foreign states' territory." ***Tchacosh Co. Ltd. v. Rockwell Int. Corp.***, 766 F.2d 1333, 1335-36 (9th Cir. 1995) *citing*, ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964) and ***Underhill v. Hernandez***, 168 U.S. 250, 252 (1987).

3. Finally, petitioner asks this Court to consider "special circumstances" in an effort to circumnavigate the doctrines of *res judicata* and issue preclusion. However, petitioner failed to raise or ask the district court to consider any "special circumstances" in its Complaint, its Response Opposing Respondents' Motion for Summary Judgment, its Statement of Genuine Issues, its Memorandum in Support of Motion for Summary Judgment, or in its Reply Memorandum. It did not argue "special circumstances" at the hearing

before the district court on summary judgment. Although the claim for "special circumstances" is not properly before this Court, respondents do take issue with petitioner's characterization of certain facts.

First, petitioner advances another new argument of "special circumstance" not raised before the district court— a perceived threat to national security by cutting off of electricity to two border crossing stations on the Canadian border. Factually, the argument lacks any support as evidenced in the transcript of oral argument before the district court and by the recent proceedings in tribal court. Pet.App. 27a and 39a. Respondents simply seek to collect the judgment through payment of power bills for electricity sold to customers of petitioner within the reservation who are tribal members and tribal businesses. Respondents do not seek to cut off power to anyone inside or outside the reservation, nor is there is any threat of cutting wires or burning power poles. Petitioner's "special circumstance" of national security is a recent fabrication without any factual basis.

Second, petitioner argues that enforcement of the judgment would bankrupt or ruin the electric cooperative and qualifies as a "special circumstance." Petitioner fails to mention that a declaratory judgment action was filed in tribal court by respondents against Federated Insurance Company, petitioner's insurer. The declaratory judgment action sought and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner. Resp.App. 7b.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 99-35162

[Filed October 19, 1999]

RON BIRD, individually and on behalf of Glacier Construction, Inc.; HERB GILHAM, individually and on behalf of Glacier Construction, Inc; and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc.;

Plaintiffs/Counterdefendants/Appellees,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant/Counterclaimant/Appellant.

On Appeal from the United States District Court for the District of Montana, Great Falls Division, District Court Cause No. CV-96-022-GF-PGH

BRIEF OF APPELLANT

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* * *

[p.15]

the tribal judgment must not be recognized and enforced.[6] Guided by Hilton v. Guyot, 159 U.S. 113, 202-03 (1895), this Court articulated the factors due process encompasses in the context of comity. Those factors are: (1) the opportunity for a full and fair trial (2) before an impartial tribunal (3) that conducts the trial upon regular proceedings (4) after proper service or voluntary appearance of the defendant (5) without a showing of prejudice in the tribal court or in the system of governing laws. Id. at 811. Moreover,

> evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."

Id. (quoting Restatement (Third) of Foreign Relations Law of the United States [hereafter Restatement (3d)] § 482 cmt. b (1986)).

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[6] In district court, the Co-op argued that lack of jurisdiction also applied so as to require non-recognition of the tribal court judgment. [See CR 53]. However, except to the extent that jurisdictional issues are part of comity's due process analysis, see *infra* n. 7, the Co-op abandons its position on that issue.

The tribal court proceedings at issue here fell far short of the requirements of due process. The tribal court record reflects every one of the constitutional deficiencies this Court warned against in Wilson. Furthermore, there is abundant evidence that the Blackfeet court system suffers from infirmities that directly

* * *

APPENDIX B

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[Letterhead Names/Numbers Omitted]

June 22, 2000

Kathleen Butterfield
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U.S. Court of Appeals, 9th Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Bird et al. v. Glacier Electric Cooperative, Inc.*
Ninth Circuit Court of Appeals CA No. 99-35162

Dear Ms. Butterfield:

On May 18, 2000, we received the enclosed Order advising us, as counsel in Bird. *et al.* v. Glacier Electric, to confer with counsel in two other appeals to be orally argued on July 18, 2000 "because they may involve similar issues regarding Tribal Court jurisdiction." The two "related" appeals are:

1. Bugenig v. Hoopa Valley Tribe, CA No. 99-1-5654; and

2. Weter v. Archambault, CA No. 99-35638.

As instructed, we conferred with counsel in those two cases, and exchanged appellate briefs. It is now evident that these appeals are in fact dissimilar. Our appeal in Bird does not involve any issues of tribal jurisdiction, as do Bugenig and Weter. Enclosed please find a copy of the table of contents from our opening brief which shows there are no issues involving tribal jurisdiction. We thought the Court should be made aware of this fact before oral argument.

Very truly yours,

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

/s/ T. Lonnevik
By Tiffany B. Lonnevik

enclosures
cc: Jerry Lynch/Patrick Flaherty

APPENDIX C

IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN RESERVATION
BROWNING, MONTANA

CAUSE NO. 94CA32
[Filed September 12, 1994]

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SCOTT SHERBURNE, RON BIRD and HERB GILHAM, d/b/a GLACIER CONSTRUCTION, INC., and JULIE SHERBURNE, TONI GILHAM and PHYLLIS GILHAM,
Plaintiffs,

vs.)
)
THE FEDERATED RURAL ELECTRIC)
INSURANCE CORPORATION, AND)
GLACIER ELECTRIC COOPERATIVE,)
INC.,)
Defendants.)
)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter having been brought before the Court on motion of plaintiffs to grant summary judgment, and the Court, having read the briefs and other materials of the parties, and being fully advised,

IT IS HEREBY ORDERED that plaintiffs' Motion for Summary Judgment is granted; and

IT IS FURTHER ORDERED that insurance coverage is established, provided and available for payment of the Judgment in Case No. 92-CA-269, which Judgment was filed with The Blackfeet Tribal Court on May 19, 1993. The insurance coverage is provided by policies issued by The Federated Rural Electric Insurance Corporation as Follows: (1) Policy No. 25 ARB 005, described as an "all-risk blanket policy," up to the stated limits of $1,000,000; (2) Policy No. 25-DOM 012-92, described as a "Directors Managers Officers Liability and Corporate Indemnification Policy" up to the stated limits of $10,000,000; and (3) Policy No. 25 UMB 005, described as a

"Commercial Umbrella Policy," up to the stated limits of $10,000,000; and

IT IS FURTHER ORDERED that costs are awarded to the plaintiffs in accordance with Tribal law and in an exact amount to be determined at a later date

Dated this 12th day of September, 1994

/s/ Don Sollars
Tribal Court Judge